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No. 96-1273

In The

Supreme Court of the United States

October Term, 1996

GLASS MOLDERS, POTTERY, PLASTICS & ALLIED WORKERS INTERNATIONAL AFL-CIO, CLC NO. 243,

Petitioner,

vs.

CARMELA F. DURKO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a union can be held liable for punitive damages pursuant to Title VII of the Civil Rights Act and the Pennsylvania Human Relations Act?

2. Whether the previous determinations of the National Labor Relations Board dealing with Ms. Durko's allegation of discrimination regarding the Union's handling of her grievance involving a seniority dispute were irrelevant to her claims that the Union discriminatorily failed to process her sexual harassment grievances, therefore causing any issue as to the propriety of exclusion of such evidence moot?

3. Whether the courts below properly upheld the factual finding of the jury that the Union discriminatorily failed to pursue sexual harassment grievances on behalf of Ms. Durko?

4. Whether the courts below properly refused to remit the twenty-five thousand ($25,000) dollar punitive damage award against the Union, considering the Union's deliberate and discriminatory failure to pursue sexual harassment grievances on Ms. Durko's behalf?

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STATEMENT OF THE CASE

A. Procedural History

This action was commenced by Complaint filed by Carmela F. Durko on August 17, 1993, setting forth a cause of action against OI-NEG TV Products, Inc., hereinafter "Employer," for discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), *et seq.*, as well as a claim of discrimination based on sex pursuant to the Pennsylvania Human Relations Act, 43 Pa. C.S.A. § 951, *et seq.* (App. 12-94).[1]

The Complaint further sets forth similar causes of action against Glass, Molders, Pottery, Plastics & Allied Workers International AFL-CIO, CLC No. 243, hereafter "Union" for discrimination in violation of Title VII and the PHRA. (*Id.*)

A jury trial commenced on September 20, 1994 and concluded on September 26, 1994. With respect to the Employer, the jury found that Ms. Durko proved by a preponderance of the evidence that she was subjected to hostile environment sexual harassment, and that the Employer was aware that she was being subjected to a sexually hostile work environment and failed to take appropriate corrective action (App. 132-135). The jury awarded compensatory damages from Employer in the amount of fifty thousand dollars ($50,000) (App. 133).

With respect to the Union, the jury found that Ms. Durko proved by a preponderance of the evidence that she was subjected to hostile environment sexual harassment and that the Union discriminatorily failed to pursue sexual harassment grievances on her behalf (App. 134). The jury awarded fifty

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1. "App." refers to the joint appendix filed with the Court of Appeals for the Third Circuit.

thousand dollars ($50,000) in compensatory damages and twenty five thousand dollars ($25,000) in punitive damages from the Union (App. 134-135). Judgment was entered by the District Court on September 28, 1994 (App. 423).

On or about October 12, 1994, both Employer and Union filed post-trial motions (App. 428-438). The motions of the Employer and Union were denied by the District Court by Memoranda and Orders dated December 29, 1995 and December 31, 1995 respectively (App. 1653-1691, 1672-1694).

The Employer filed its appeal to this Honorable Court on January 26, 1996 (App. 1695) with the Union filing its appeal on January 29, 1996 (App. 1696).

The Employer and Union filed appeals to the Third Circuit which were denied by Order dated November 12, 1996.

B. Factual Background

Carmela Durko became employed by Employer on or about March 31, 1986 (App. 15). At all relevant times, Ms. Durko was a member of Local 243 of the Glass, Molders, Pottery, Plastic & Allied Workers International Union AFL-CIO-CLC, hereinafter "Union" (App. 15).

The issues pertinent to the present petitions arise from the jury's finding that Ms. Durko was subjected to hostile work environment sexual harassment of which the Employer was aware, and failed to take appropriate action, as well as the finding that the Union discriminatorily failed to pursue sexual harassment grievances on Ms. Durko's behalf (App. 132-135).

The jury found for the Employer and Union with respect to Ms. Durko's claim that she was removed by the Employer from

her position as Assistant Furnace Operator because of her sex, and that her gender was a determinative factor in the Union's decisions involving resolution of Ms. Durko's grievances relative to such removal. These verdicts in favor of the Employer and Union relative to Ms. Durko's claim of recall rights to the Assistant Furnace Operator's position have not been appealed and therefore are not before this Honorable Court.

The sexual harassment of Ms. Durko began in June of 1991, when she began working in the Batch and Furnace Department as an Assistant Furnace Operator (App. 16). Ms. Durko was initially given a tour by her foreman, Ron Walsh, during which Ms. Durko was made to crawl under the extremely hot furnace and go to the batch house to a height of approximately five stories (App. 541-545). The only protective equipment given to Ms. Durko to wear during this tour was a pair of paper coveralls, when the required safety equipment consisted of material coveralls and a respirator to prevent the inhalation of dangerous chemicals (App. 541-550).

Ms. Durko testified that from her observations of men being taken on similar tours, none were taken underneath the furnace (App. 675).

During the time Ms. Durko worked as an Assistant Furnace Operator, Mr. Walsh, her foreman and a member of management, would continually call Ms. Durko vile and disgusting names containing references to her gender, such as "dumb cunt" and "stupid bitch" (App. 564). Regarding the time it would take Ms. Durko to qualify as an Assistant Furnace Operator, Mr. Walsh stated that it would take her eighteen months to be qualified, and if she would be "nice to him", it would take her nine months (App. 563). Ms. Durko immediately made Mr. Walsh aware of her anger regarding such comment (App. 564).

On one of David Troutline's tours, Ms. Durko was requested to push a heavy charger to see if she could handle the job (App. 582). After Ms. Durko pushed the charger with all of her might, and she could not do it, Mr. Troutline stated "Well, that's part of your job duties. If you can't do that, well then you should turn down the job" (App. 616). During this incident, Mr. Troutline purposely neglected to tell Ms. Durko that the brake was on, with Ms. Durko only finding out that the brake was engaged when another worker approached her and took the brake off (App. 582).

Ms. Durko was also sexually harassed by Tom Wozniak, a Furnace Operator in the Batch and Furnace Department. During her initial five day trial period at the position of Assistant Furnace Operator, Mr. Wozniak would tell her that she "broke the barrier" by being the first woman as an Assistant Furnace Operator, kept taking her on tours of the "hot spots" of the department and repeatedly told her "You'll never do it. You'll never make it", as well as telling her "It's not a job for a woman" (App. 554-555).

While working with Ms. Durko, Mr. Wozniak would remark that she was "flat chested" approximately once a day for the eighteen month period Ms. Durko was in the Batch and Furnace Department (App. 573).

Approximately three months after she had begun the position in June of 1991, Mr. Wozniak began throwing hard cover books at her whenever he would get angry, striking her on one occasion (App. 570, 684).

Walter Snopeck, who was tasked with training Ms. Durko as an Assistant Furnace Operator, also called her crude names containing references to her gender, such as "dumb cunt" and "stupid bitch," plenty of times during the period of time she worked in the Batch and Furnace Department (App. 567-568).

Regarding the incidents of sexual harassment, Ms. Durko made reports to Union Stewards Randy Robbins, Mike Lieback, Joe Thomson, Gene Warnick, and Tom Yankey, as well as Union President Peter Moska and Union Business Agent Joseph Lutecki (App. 565-571, 574-585). Although certain Union representatives filed grievances regarding Ms. Durko's recall rights, no Union representative would submit a sexual harassment charge, despite repeated requests by Ms. Durko (App. 583).

Ms. Durko filed a Complaint with the Pennsylvania Human Relations Commission on August 4, 1992, containing, *inter alia* allegations of a sexually hostile work environment by both Employer and Union (App. 279).

Margaret Guffrovich, a witness for Employer, stated that such complaint was served on Employer as early as September, 1992 (App. 1439).

Further, at trial, it was stipulated *as fact* by the Employer and all other parties that the Employer had actual notice of Ms. Durko's complaints of sexual harassment by Mr. Walsh, a member of management. The stipulation of fact was as follows:

> Union President, Peter Moska, asked Margaret Guffrovich, from personnel, to investigate Ms. Durko's complaints of harassment against Mr. Walsh. After speaking with Mr. Walsh, Ms. Guffrovich reported back to Mr. Moska that there was no basis for Ms. Durko's complaints. (App. 525).

Mr. Moska also confirmed the reports of sexual harassment to the Personnel Department (App. 1325-1335).

Mr. Walsh testified that he attended a meeting with Margaret Guffrovich and Mary Reynolds, another member of management, regarding the allegations of harassment, after which he did it not hear back from either member of management and was not disciplined (App. 991-996).

On January 13, 1993, Ms. Durko was transferred to the Forming and Selecting Department because her temporary bid as Assistant Furnace Operator had expired (App. 588). Ms. Durko was subjected to being called a variety of vulgar names over the public address system, accompanied by loud moaning, with her name being loudly screamed (App. 593). It was Ms. Durko's unrebutted testimony that she told her foreman, Lenny Brown, about this (*id.*), as well as Union President Peter Moska. Further, Ms. Durko and Mr. Moska both reported the harassment to William Konopasek, Human Resource Supervisor, a member of management. (*Id.*) After meeting with Mr. Konopasek, speakers were allegedly put in his office, but Ms. Durko testified that the harassment continued until she left the Forming and Selecting Department. (*Id.*) At trial, Mr. Konopasek acknowledged that he did not investigate the matter, as Ms. Durko did not provide him information as to who was responsible for the noises (App. 906-909).

REASONS FOR DENYING THE WRIT

Standard for Granting Writ of Certiorari

The rules of this Court state that a Petition for Writ of Certiorari "will be granted only for compelling reasons." Sup. Ct. R. 10.

In general, the Supreme Court will not grant a Writ of Certiorari merely to review evidence or inferences drawn from it. *General Copy Pictures Corp. v. Western Electric Co.*, 304

U.S. 175, 82 L. Ed. 1273, 58 S. Ct. 849 (1938). Certiorari will also be denied if the case involves circumstances or issues which are not likely to be repeated, *see Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 74 (1955) (noting that the Court reviews issues that are "beyond the academic or the mere episodic"); 13 James W. Moore, ed., *Moore's Federal Practice,* para. 810.21 at SC 10-23 (2d ed. 1995) (stating that the Court will not be inclined to review "an issue that is unlikely to recur" or "results from a unique factual situation"), or if "the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

Moreover, certiorari will be granted "only in cases involving principles, the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority" between the Courts of Appeals. *NLRB v. Pittsburgh S.S. Co.,* 340 U.S. 498, 502 (1951) (*quoting Layne & Bowler Corp. v. Western Well Works,* 261 U.S. 387, 393 (1923)).

Finally, the Court has refrained from resolving conflicts that arise between panels within the same circuit, on the grounds that such conflicts should be resolved by the Court of Appeals internally. *See, e.g., Taylor v. United States,* 493 U.S. 906, (1989); *Davis v. United States,* 417 U.S. 333, 340 (1974); *Wisniewski v. United States,* 353 U.S. 901, 902 (1957).

I.

A UNION CAN CLEARLY BE HELD LIABLE FOR PUNITIVE DAMAGES PURSUANT TO TITLE VII OF THE CIVIL RIGHTS ACT AND THE PENNSYLVANIA HUMAN RELATIONS ACT.

The Union's Petition for Writ of Certiorari with regard to

its claim that a Union cannot be held liable for punitive damages as a matter of law must be denied, as, although such issue is of first impression for the United States Supreme Court, the answer to such issue is obvious from a plain reading of the Civil Rights Act of 1964, as amended, as well as by the decision of the highest state court in Pennsylvania to review the issue with regard to the application of the Pennsylvania Human Relations Act.

The Union asserts that it cannot be liable for punitive damages under either Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 1981a, or the Pennsylvania Human Relations Act. Importantly, Union cites no provisions of the above-referenced statutes, nor any case law interpreting such statutes which supports such proposition.

The 1991 amendments to Title VII impose liability for compensatory and punitive damages on a "respondent" under certain circumstances, as follows:

> (b) Compensatory and punitive damages.
>
> > (1) Determination of Punitive damages. A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency, or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

42 U.S.C. § 1981a(b).

Thus, a plaintiff's right to punitive damages against a respondent that has engaged in discrimination cannot be denied.

The definition of "respondent" in Title VII includes an Employer, employment agency, *labor organization,* joint labor management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to § 717. 42 U.S.C. § 2000e(n) (emphasis added).

The Pennsylvania Human Relations Act prohibits discrimination by labor organizations on the basis of sex. (*See* 43 Pa. C.S.A. § 955(c)-(e)).

The Union argues that since punitive damages are not available under the National Labor Relations Act in some circuits for breach of a Union's duty of fair representation, that this somehow precludes an award of punitive damages under Title VII of the Civil Rights Act. Union further argues that since an individual employee cannot be liable for punitive and compensatory damages under Title VII, that this somehow, by analogy, absolves a labor union of similar liability. Union also argues that it cannot be held liable absent evidence that it employs any employees under the damage limitation section of the 1991 amendments, 42 U.S.C § 1981a(b).

Union cites *Miller v. Maxwell's International, Inc.*, 991 F.2d 583 (9th Cir. 1993), and *Verde v. City of Philadelphia*, 862 F. Supp. 1329 (E.D. Pa. 1994), for the proposition that *individual employees* cannot be held liable for compensatory and punitive damages under Title VII as Congress did not intend to impose liability on individuals who had the misfortune to work for large employers. The Union then equates the status of an individual employee with that of a labor union, and concludes that labor unions are also excluded from liability. The Union cites no cases

in which a union was excluded from liability based on the limitations stated in 42 U.S.C. § 1981a(b).

The Union's reliance on the above cases is misplaced, in that such cases hold that individuals have *no* liability for backpay or any other item of damages under § 706(g) of Title VII. The courts have recognized that in 1964, Congress did not intend to hold individuals liable for *any* damages, and that the 1991 Civil Rights Act, with its liability limits based on numbers of persons employed, confirms the original legislative intent. *See, e.g., Tomka v. Seller Corp.*, 66 F.3d 1295, 1314-15 (2nd Cir. 1995). Thus, individual employees are not "respondents" under § 1981a, and labor organizations are "respondents" under that section.

The Court of Appeals for the Second Circuit has recently found that in order to hold a local union liable in its capacity as a labor organization under Title VII, the plaintiff must allege that she was discriminated against in her capacity as a union member as opposed to her capacity as union employee. *Yerdon v. Henry*, 91 F.3d 370 (2d Cir. 1996).

Thus, the distinction between the union acting as a labor organization, and the union acting as an employer, is critical. In *Yerdon, supra,* the plaintiff, a secretary to the local union, was sexually harassed by newly nominated officers of the union in an effort to force her to resign. Because the union was acting in its capacity as employer, the threshold number of employees which must be met before liability is assessed was applicable.

In the present case, there is no dispute that Ms. Durko sued her Union in her capacity as a Union member rather than an employee of the Union, which she definitely was not.

Therefore, the numerical requirements relative to "employer" are not applicable under the present facts. *See also*

Chavaro v. Local 241, Div. of the Amalgamated Transit Union, 787 F.2d 1154 (7th Cir. 1986) (Under Title VII, a union can be both an "employer" and a "labor organization." As a labor organization, the union is covered under the Act and may be liable with respect to its dealings with employers or its membership, *see* 42 U.S.C. § 2000e-2(c), if it fits the definition of a labor organization).

Regarding the Union's assertion that 42 U.S.C. § 1981a(b) absolves it from liability in the absence of evidence that it employs any employees, such interpretation ignores the plain language of that statute, which indicates that such section allows for *limitations* of compensatory and punitive damages rather than an exclusion of such damages.

The Union implies that it is Ms. Durko's burden to present evidence of the number of its employees so that she can limit her own damages. It is respectfully asserted that it is the Union's burden to present evidence that would limit its liability. *Cf. Strauss v. Stratojac Corp.*, 810 F.2d 679, 687 (7th Cir. 1987); *Stinson v. Edgemoor Iron Works, Inc.*, 53 F. Supp. 864, 868 (D. Del. 1944) (generally burden of proof is on the defendant when it is seeking to mitigate its liability).

It is also submitted that if the Union presented no such evidence, no limitation applies.

Alternatively, even if it is deemed that Ms. Durko had the burden to provide evidence to limit her own damages, evidence of record indicates that the Union had at least fifty-two paid employees sufficient to award compensatory and punitive damages, even under the Union's theory (App. 70-73, 544, 1153, 1377-1378).

Therefore, based on the above discussion, the Union has

sufficient employees to impose liability, even if the Union's argument regarding such threshold is adopted.

Even if it is determined that compensatory and punitive damages are somehow limited under 42 U.S.C. § 1981a, Ms. Durko is entitled to punitive and compensatory damages under her claim pursuant to the Pennsylvania Human Relations Act, 43 Pa. C.S.A. § 951, *et seq.*, without limitation.

It has been held that punitive and compensatory damages are available under the PHRA, *Rogers v. Mt. Union Borough By Zook*, 816 F. Supp. 3?8 (M.D. Pa. 1993); *Keck v. Commercial Union Insurance Co.*, 758 F. Supp. 1034 (M.D. Pa. 1991).

In *Keck, supra,* the Court stated

> . . . The Pennsylvania Commonwealth Court has upheld the award of punitive damages, expressly holding that the PHRA does not contain the damages limitation expressed in Title VII. *Brown Transport Corp. v. Commonwealth of Pa., PHRC,* 133 Pa. Com. 545, 578 A.2d 555, 562 (1990).
>
> Further, other courts have recognized that relief under the PHRA is not limited to that available under Title VII. See e.g. *Nestor v. Quaker State Coca-Cola Bottling Co.,* 579 F. Supp. 289, 292 (W.D. PA 1984); *PHRC v. Zanmantakis,* 478 Pa. 454, 459, 387 A.2d 70, 73 (1978) (under "legal or equitable relief" provision, the court could award damages for humiliation and mental anguish).

Id. at 1040.

As stated above, the PHRA contains no limitation on an award of punitive damages. Thus, even if Title VII is interpreted to limit such damages, the jury was subject to no such constraints pursuant to Ms. Durko's state cause of action.

Additionally, numerous other courts within the Third Circuit have held that punitive damages are permitted by the PHRA. *See, e.g., Clark v. Pennsylvania,* 885 F. Supp. 694, 715 (E.D. Pa. 1995); *Griffiths v. Cigna Corp.*, 857 F. Supp. 399 (E.D. Pa. 1994); *Galeone v. American Packaging Corp.*, 764 F. Supp 349, 352 (E.D. Pa. 1991); *Lubin v. American Packaging Corp.*, 760 F. Supp. 450, 451 (E.D. Pa. 1991).

In the absence of an authoritative pronouncement from the Pennsylvania Supreme Court, a federal court must predict how that court would rule. As stated in *Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co.*, 652 F.2d 1165 (3rd Cir. 1981):

> To make this prognostication, we are not inflexibly confined by dicta or by lower state court decisions, *although we should look to such statements as indicia of how the state's highest court might decide. See, McKenna v. Ortho Pharmaceutical Corp.*, 622 F.2d 657, 662 (3rd Cir. 1980).

Id. at 657 (Emphasis added).

It is submitted that the Pennsylvania Commonwealth Court case of *Brown Transport Corp., supra,* provides strong indicia of how the Pennsylvania Supreme Court would rule on the issue of whether punitive damages are allowed under the PHRA, as well as the numerous federal court rulings cited above predicting the same result.

II.

THE PRIOR DETERMINATIONS OF THE NATIONAL LABOR RELATIONS BOARD WERE PROPERLY EXCLUDED AS THEIR PREJUDICIAL EFFECT OUTWEIGHED THEIR PROBATIVE VALUE. ALSO, SUCH DETERMINATION DID NOT ADDRESS THE ISSUE OF WHETHER THE UNION DISCRIMINATORILY FAILED TO FILE SEXUAL HARASSMENT GRIEVANCES ON MS. DURKO'S BEHALF.

The Union's Petition for Writ of Certiorari with regard to whether the previous determinations of the National Labor Relations Board were properly excluded from evidence must be denied as this is again an allegation of error with regard to a misapplication of or properly stated rule of law. Sup. Ct. R. 10.

The Union's request that the previous NLRB determination should have been submitted to the jury was properly denied by the court below.

It is critical to note that the NLRB has never ruled on the issue of whether the Union discriminatorily failed to file grievances regarding *sexual harassment* on behalf of Ms. Durko. By letter dated September 14, 1992, the NLRB clearly stated the allegations against the Local and International Unions as follows:

> The charges against the Unions allege that they breached their duty of fair representation by failing to process your grievances over being bumped from the Assistant Furnace Operator position . . .

(App. 210).

In its second ruling on April 12, 1993, the NLRB again clearly stated the issue upon which it was issuing a ruling as follows:

> . . . [T]he charge against the Union alleges that it failed to process a grievance over your unsuccessful bid for Assistant Furnace Operator — A Shift in January, 1993, in violation of the duty of fair representation . . .

(App. 213).

Again, the NLRB was never tasked with deciding the issue as to whether the Union discriminatorily failed to process sexual harassment grievances on behalf of Ms. Durko, and never issued a decision on that issue. Also the jury found against the respondent with regard to her claim that the grievances regarding the Assistant Furnace Operator's position were discriminatorily processed, making the NLRB' s determinations irrelevant.

In support of its position that the NLRB's determinations were improperly excluded, the Union relies on *Arnold v. United Association of Journeymen*, 388 F. Supp. 1105 (W.D. Pa. 1975), *aff'd*, 529 F.2d 511 (3rd Cir. 1975), and *Smith v. Local 25, Sheetmetal Workers International*, 500 F.2d 741 (5th Cir. 1974).

In the present case, the trial court found that

> . . . the marginal relevance of the NLRB's determinations was completely outweighed by the probability of prejudice. A strong possibility existed that the jury would improperly substitute the determination of another fact-finding body, the NLRB, for its own considered judgment of the evidence or

> accord it far too much weight in its ultimate decision . . .

(Union's Petition at A-18).

The possibility of prejudice outweighing the probative value of such evidence was not an issue in *Arnold, supra,* in that such case was a non-jury trial. The possibility of prejudice outweighing the probative value of such evidence was also not an issue in *Smith, supra,* a case which addressed a summary judgment motion, in which the court considered the NLRB determination.

Although Union cites cases which allow such determinations in certain circuits to have *res judicata* effect in future actions under Sec. 301 of the NLRA, *see, e.g., Baker v. Detroit Riverview Hospital,* 834 F. Supp. 216 (E.D. Mi. 1993); *Rudolph v. Wagner Electric Corporation,* 68 CCH 12, 798 (E.D. Mo. 1972), Union acknowledges that the authorities are split on such proposition (Union's Petition at 18). Further, the Union cites no case in which an adverse NLRB determination was held admissible in a Title VII action.

Therefore, the exclusion of such evidence was proper and not prejudicial to the Union in any way.

III.

THE EVIDENCE AT TRIAL WAS SUFFICIENT TO SUPPORT THE JURY'S DETERMINATION THAT THE UNION DISCRIMINATORILY FAILED TO PURSUE SEXUAL HARASSMENT GRIEVANCES ON BEHALF OF MS. DURKO.

The Union's Petition for Writ of Certiorari must be denied

as its allegation with regard to the above issue merely alleges an erroneous factual finding in the court below. Sup. Ct. R. 10

Union asserts that Ms. Durko failed to state with adequate specificity the occasions on which Ms. Durko lodged complaints with the Union concerning incidents of sexual harassment and the Union's failure to respond to such complaints (Union's Petition at 17).

Specifically, Ms. Durko testified that she approached Joe Thomson once per week from June of 1991 through January of 1993 with the complaints of sexual harassment and that he would run away from her (App. 668-669). Ms. Durko also told Business Agent Joseph Lutecki and Union President Peter Moska of the sexual harassment by Mr. Snopeck and Mr. Walsh (App. 568-569). Ms. Durko also reported being sexually harassed to Union Stewards Robbins, Lieback, Warnick, and Yankey, with no grievances subsequently filed on her behalf (App. 686-688, 1250-1257).

Regarding sexual harassment, Mr. Moska stated to Ms. Durko that she had no grievance (App. 682-683).

Further, on or about January of 1993, Ms. Durko complained to Union President Peter Moska about being sexually harassed over the intercom system, with both Ms. Durko and Mr. Moska informing Human Resources Director, William Konopasek, of the harassment (App. 594). Although the harassment did not stop after such meeting, no grievance was filed.

Union cites *Frazier v. Southeastern Pennsylvania Transp. Auth.*, 785 F.2d 65 (3rd Cir. 1986), for the proposition that:

> Conclusory allegations of mishandled grievances, without providing specificity,

> leads to the conclusion that the claims are frivolous and ultimately should lead to the dismissal of those claims.

(Union's Petition at 20).

However, *Frazier,* dealt with the sufficiency of allegations in a complaint to provide notice to a defendant to prepare an adequate defense.

As indicated above, specific time frames of Ms. Durko's grievance requests were given to the Union both prior to trial and at trial. Certainly, such information allowed the Union to investigate and adequately prepare a defense to the charges.

The fact that the Union did file certain other grievances for Ms. Durko but would not include a specific sexual harassment charge is indicative that such charges were not included because of Ms. Durko's gender.

Union cites the United States Supreme Court case of *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987) for the proposition that a union which intentionally avoids asserting discrimination claims can be liable under Title VII. Union tries to distinguish the *Goodman* case from the case at bar by stating:

> However, in that case, unlike here, the black union members established that the Union had ignored grievances based on instances of harassment which were indisputably racial in nature and that the Union had regularly refused to include assertions of racial discrimination in grievances that also asserted contract violations.

(Union's Petition at 23, n.12).

In the present case, the jury made a parallel finding, except that the discrimination complained of was sexual and not racial.

Based on the above evidence, it is clear that the evidence was more than sufficient to support the jury's finding that the Union discriminatorily failed to process sexual harassment grievances on Ms. Durko's behalf.

IV.

THE EVIDENCE PRESENTED AT TRIAL WAS SUFFICIENT TO SUPPORT THE JURY'S AWARD, AND THE AMOUNT OF PUNITIVE DAMAGES AGAINST THE UNION, THEREBY MAKING REMITTITUR IMPROPER.

The Union's Petition for Writ of Certiorari must be denied as again alleging an erroneous factual finding in the court below, as well as a misapplication of a properly stated rule of law. Sup. Ct. R. 10.

Under Title VII, punitive damages are allowed against a respondent "[I]f the complaining party demonstrates that the Respondent engaged in a discriminatory practice or discriminatory practices with malice or reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b).

Under the Pennsylvania Human Relations Act, a defendant must knowingly and maliciously deprive a plaintiff of her civil rights for such damages to be awarded. *Rogers v. Mt. Union Borough By Zook, supra.*

As indicated earlier, regarding testimony of Ms. Durko's efforts to file sexual harassment grievances with her Union Stewards, malice or reckless indifference to Ms. Durko's civil rights cannot be doubted.

Ms. Durko's efforts to have Union officials pursue her sexual harassment grievances were detailed earlier in this brief and will not be repeated.

Based on the Union's conduct, it can be logically concluded that the Union's complete ignorance of Ms. Durko's repeated sexual harassment complaints amounts to reckless indifference and malice.

Regarding the issue of remittitur, the Union asserts that the punitive damages awarded against it were so excessive as to require such relief.

Remittitur is available only where the verdict is so large as to offend the conscience of the court. *Motter v. Everest & Jennings, Inc.*, 883 F.2d 1223, 1230 (3rd Cir. 1989); *Bolden v. Southeastern PA Transp. Auth.*, 820 F. Supp. 949, 951 (E.D. Pa. 1993), *affirmed*, 1994 U.S. App. LEXIS 6575 (3rd Cir. 1994).

Union cites four cases regarding punitive damage verdicts against a union, providing examples of relatively small punitive damage awards under federal labor law statutes, such as the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401, *et seq.* (Union's Petition at 24-27). However, Union conveniently fails to mention other cases under the same statute, which allowed for significant punitive damage awards against a union. *See, e.g., Morrissey v. National Maritime Union of America*, 544 F.2d 19 (2nd Cir. 1976) (punitive damages against a union totalled one hundred thousand ($100,000) dollars for improper disciplinary action against a union member); *Doty v. Sewall*, 908 F.2d 1053 (1st Cir. 1990) (punitive damages against local union of three hundred thousand ($300,000) dollars not excessive in view of Union member's exclusion from some types of Union activities for three years and ultimate removal from his position as Union Steward because of his inability to secure

a transfer); *Taliaferror v. Schiro,* 669 F. Supp. 763 (W.D. La. 1987) (punitive damages assessed against a union in the total amount of one hundred twenty thousand ($120,000) dollars, ten thousand ($10,000) dollars to each plaintiff, based on union's breach of its duty of fair representation).

Based on the severity of the actions of the Union, with its malicious and grossly indifferent attitude toward Ms. Durko's, numerous sexual harassment complaints, Ms. Durko was forced to endure repeated incidents of harassment on almost a daily basis from numerous employees, suffering repeated crying spells and loss of sleep (App. 770-772).

The Union contends that due to its size, the damages awarded are excessive. It must be remembered that in addition to *net* assets of approximately one hundred thousand ($100,000) dollars, such Union takes in approximately seven thousand ($7,000) dollars per month in local union dues (App. 778-784).

If the Union wished for its damages to be limited under 42 U.S.C. § 1981a, it should have produced evidence that would allow such limitations to be implemented.

Based on the facts of this case, it cannot be said that the conscience of the Court should have been shocked by the jury's punitive damage award of twenty-five thousand ($25,000) dollars, and therefore, the award is proper.

CONCLUSION

For the foregoing reasons, the Petition of the Union for a Writ of Certiorari should be denied.

Respectfully submitted,

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